

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 159

MRS. EULA MAY WALTON, ADMINISTRATRIX OF THE
ESTATE OF FRED WALTON, DECEASED,

Petitioner,

VS.

SOUTHERN PACKAGE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF
MISSISSIPPI.

BRIEF OF PETITIONER.

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vs.

Petitioner,

SOUTHERN PACKAGE CORPORATION,

Respondent.

BRIEF OF PETITIONER

I.

The Opinion of the Court Below.

The opinion in the Supreme Court of Mississippi is reported in 11 So. (2d) 912 and is set out in the Record,* pages 5-17.

II.

Statement of the Case.

Petitioner's decedent, Fred Walton, brought suit in the Circuit Court of Claiborne County, Mississippi, under the Fair Labor Standards Act of 1938 (52 Stat. at L. 1060,

* NOTE: All references herein to "Record, page —" have reference to the official printed Transcript of Record.

Title 29 U. S. C. A., Sections 203 (j), 206, 207, and 216 (b) for overtime compensation, liquidated damages, and attorney's fees (Record, page 3). After suit was filed and before judgment was rendered in the Circuit Court of Claiborne County, Mississippi, Fred Walton died. By order of said court, petitioner, the widow and duly appointed administratrix of his estate was substituted as plaintiff in this cause (Record, page 3). The Circuit Court of Claiborne County, Mississippi, rendered a judgment in her favor for the total sum of \$900.00: \$400.00 for back wages for overtime work, \$400.00 for liquidated damages, and \$100.00 for attorney's fees (Record, page 7). The Southern Package Corporation appealed to the Supreme Court of the State of Mississippi, and this judgment was reversed on appeal and judgment rendered for appellant-defendant on February 15, 1943, with Chief Justice Smith dissenting 11 So. (2d) 912; (Record, pages 5-17): This cause is now presented to this Honorable Court upon order allowing certiorari (Record, page 18).

The facts in this case are briefly stated as follows: The defendant in the lower court, Southern Package Corporation, was engaged in the manufacture of timber products in Claiborne County, Mississippi (Record, page 1). It employed the defendant as a night watchman from August 1, 1939, to April 1, 1940 (Record, page 1). It was admitted by defendant in the agreed statement of facts that a "substantial part of the products so manufactured by defendant are shipped outside the State of Mississippi," and that this corporation was engaged in the same business at the time it employed Fred Walton as a night watchman.

It was further admitted by the defendant corporation that: "It was the duty of said Walton, as night watchman at said plant, to make an hourly round of the plant and punch a night watchman's clock located at various stations

on said plant and to report any fires and trespassers" (Record, page 2). It, therefore, appears that Fred Walton had the usual duties of a night watchman in guarding and protecting respondent's plant, where timber products were manufactured for interstate commerce and where they awaited transportation. It was also admitted by the respondent that "if said Fred Walton was entitled to receive overtime, as provided for under the Fair Labor Standards Act (Title 29 U. S. C. A., Sections 201 to 216) that there would have accrued under the provisions of said Act an additional sum of \$400.00 for overtime" (Record, page 3). The defendant corporation, therefore, admitted that Fred Walton had not been paid in accordance with the provisions of the Fair Labor Standards Act of 1938; and, therefore, if his employment was covered by the Act, under the terms of the Act he should receive \$400.00 overtime compensation, \$400.00 liquidated damages, and a reasonable attorney's fee.

The respondent contended in the lower court that a night watchman is not entitled to the benefits of the Fair Labor Standards Act of 1938 when he is employed to guard and protect a plant where timber products are manufactured for interstate commerce; that an action of this nature for unpaid overtime compensation, liquidated damages, and attorney's fees is an action for a penalty and would not survive for the benefit of the deceased plaintiff's estate when the original plaintiff died after suit was brought; and that the Mississippi one-year statute of limitations for penalties and forfeitures, Section 2501, Mississippi Code of 1930, would apply to this action so as to bar an action for the employee's claim for overtime compensation. These matters were presented to the Mississippi Supreme Court for its decision in this cause (Record, pages 5-6).

III.

Specification of Errors.

1. The Mississippi Supreme Court erred in finding and holding that a night watchman whose duties were to guard and protect a timber manufacturing plant where products were manufactured for interstate commerce is not engaged in a "process or occupation necessary to the production of goods for commerce" and is not entitled to the benefits of the Fair Labor Standards Act of 1938, Title 29 U. S. C. A., Sections 203 (j), 206, 207, and 216 (b).

2. The Mississippi Supreme Court erred in not deciding that an employee's suit for overtime compensation, liquidated damages, and attorney's fees under Section 16(b) of the Fair Labor Standards Act of 1938 will survive for the benefit of his estate and can be maintained by his administratrix when the original employee-plaintiff dies after filing suit and before securing a judgment.

3. The Mississippi Supreme Court erred in not deciding that an employee's suit for overtime compensation, liquidated damages, and attorney's fees under Section 16 (b) of the Fair Labor Standards Act of 1938 is not a suit for a penalty, and that this action when originated in the Circuit Court of Claiborne County, Mississippi, is not governed by the Mississippi one-year statute of limitations for penalties and forfeitures (Section 2301, Mississippi Code of 1930).

IV.

ARGUMENT.**Summary.**

Point A. According to decisions of the United States Supreme Court and according to a logical interpretation of the Fair Labor Standards Act of 1938, a watchman whose

duties were to guard and protect a timber manufacturing plant where products were manufactured for interstate commerce is engaged in a "process or occupation necessary to the production of goods for commerce" and is entitled to the benefits of the Fair Labor Standards Act of 1938, Title 29 U. S. C. A., Sections 203 (j), 206, 207, and 216 (b).

Point B. Under a reasonable construction of the law applicable and in accordance with decisions of analogous cases an employee's suit for overtime compensation, liquidated damages, and attorney's fees under Section 16 (b) of the Fair Labor Standards Act of 1938 will survive for the benefit of his estate and can be maintained by his administratrix when the original employee-plaintiff dies after filing suit and before securing a judgment.

Point C. In accordance with the prior decision of the United States Supreme Court and in accordance with a reasonable and logical construction of the Fair Labor Standards Act of 1938, an employee's suit under Section 16 (b) of said Act for overtime compensation, liquidated damages and attorney's fees is not a suit for a penalty, and when an action of this kind is originated in a state court of the State of Mississippi, Section 2301 of the Mississippi Code of 1930, providing a one-year statute of limitations for actions brought to collect penalties or forfeitures, is not applicable.

POINT (A).

Under the facts of this case Fred Walton had been employed by respondent, Southern Package Corporation, as a night watchman, his duties being to guard and protect respondent's plant by making rounds of the plant and reporting fires and trespassers. The question here involved is whether an employee having the duties performed by

Fred Walton is entitled to the benefits of the Fair Labor Standards Act of 1938.

Under the terms of the Act, Section 3 (j), an employee is entitled to the benefits of the Act if he is engaged in any process or occupation necessary to the production of goods for interstate commerce. While the Act itself does not define the word "necessary"; it has been judicially defined by the Supreme Court of the United States in *McCulloch v. Maryland*, 4 Wheat. 315, 413. In that case Chief Justice Marshall defined the word as follows: "To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable." This definition of the word "necessary" has been applied in the construction of the Fair Labor Standards Act of 1938 and was adopted in the case of *Fleming v. Kirschbaum Company* (C. C. A. Pa.), 124 F. (2d) 567, a case involving the employment of watchmen, which case was later affirmed by the Supreme Court of the United States in the case of *Kirschbaum Co. v. Walling* (1942), 316 U. S. 517, 86 L. Ed. 1638.

The principles involved in this case are controlled by the cases of *Kirschbaum Co. v. Walling* and *Arsenal Building Corporation et al. v. Walling* (1942), 316 U. S. 517, 62 S. Ct. 116, 86 L. Ed. 1638, since these cases, which were decided together, are leading decisions of the United States Supreme Court involving the application of the Fair Labor Standards Act of 1938 to employment similar to that of Fred Walton.

A comparison of *Kirschbaum Co. v. Walling* and *Arsenal Building Corporation v. Walling*, 316 U. S. 517, 62 S. Ct. 116, 86 L. Ed. 1638, *supra*, and the instant case reveals the following similarity in facts:

In the cases of *Kirschbaum Co. v. Walling* and *Arsenal Building Corporation v. Walling*, *supra*, the United States

Supreme Court states the facts regarding the employers' occupation as follows: "The facts in the two cases differ only in minor detail. In No. 910, the petitioner owns and operates a six-story loft building in Philadelphia. The tenants are, for the most part, manufacturers of men's and boy's clothing. In No. 924, the petitioners own and operate a twenty-two story building located in the heart of the New York City clothing manufacturing district. Practically all of the tenants manufacture or buy and sell ladies' garments. Concededly, in both cases the tenants of the buildings are principally engaged in the production of goods for interstate commerce."

In the instant case the agreed statement of facts (Record, page 1) sets out the facts regarding the employer's occupation as follows: "(1) That the defendant is a corporation organized under the laws of the State of Delaware; and is engaged in operating a veneer plant at Port Gibson, Mississippi, at which plant it manufactures veneer from logs. That a substantial part of the products so manufactured by the defendant are shipped outside of the State of Mississippi."

The case of *Kirschbaum v. Walling*, *supra*, like the instant case involved the employment of men acting as watchmen. In setting forth their duties the United States Supreme Court says that they performed the customary duties of such employees and states their duties as follows: "The watchmen protect the buildings from fire and theft." That Fred Walton had the same duties as these employees is set out in the agreed statements of facts (Record, page 2): "It was the duty of said Walton, as night watchman at said plant, to make an hourly round of the plant and punch a night watchman's clock located at various stations on said plant and to report fires and trespassers."

Since the facts in these two cases decided by the Supreme Court of the United States are similar in all impor-

tant respects to the instant case, it would appear that the same legal principles would be applicable. In the decision of the United States Supreme Court it was held that the watchmen were entitled to the benefits of the Fair Labor Standards Act. The opinion delivered by Mr. Justice Frankfurter interprets the Act as follows: "The normal and spontaneous meaning of the language by which Congress defined in Sec. 3 (j), 29 U. S. C. A., Sec. 203 (j), the class of persons within the benefits of the Act, to-wit: employees engaged 'in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof' encompasses these employees, in view of their relation to the conceded production of goods for commerce by the tenants. * * * Nor can we find in the Act, as do the petitioners any requirement that employees must themselves participate in the physical process of the making of the goods before they can be regarded as engaged in their production. Such a construction erases the final clause of Sec. 3 (j) which includes employees engaged 'in any process or occupation necessary to the production' and does not limit the scope of the statute to the preceding clause which deals with employees 'in any other manner working on such goods.' "

The employers in the cases of *Kirschbaum Company v. Walling* and *Arsenal Building Corporation v. Walling*, *supra*, were the owners of buildings leased to tenants engaged in the production of goods for interstate commerce. Under the facts of *Kirschbaum Company v. Walling*, it would appear that the reason of the employer for hiring the watchmen was to induce tenants to rent their premises and to protect their buildings. However, under the terms of the Fair Labor Standards Act the character of the work done by the employee and not the employer's reason for employing him determines whether or not his employ-

ment is covered by the Act. The Supreme Court of the United States came to this logical and reasonable conclusion in the decision of the two cases cited above. Therefore, if in the instant case the employer hired Fred Walton partly to reduce insurance rates, this factor has nothing to do with the application of the Fair Labor Standards Act which depends on the character of the work performed by the employee. It is admitted by respondent in the agreed statement of facts (Record, page 2) that the duties of Fred Walton were making rounds of inspection of the respondent's plant and guarding and protecting it by reporting fires and trespassers. If the employee was in fact engaged in "any process or occupation necessary to the production" of goods for interstate commerce, he is entitled to the benefits of the Act regardless of his employer's reason for hiring him. The fact that one of the employer's reasons for employing Walton was to reduce insurance rates is of no consequence in determining whether or not he is entitled to the benefits of the Act, except that it would seem that the attitude of respondent's insurance company in requiring the employment of a night watchman in its contract with respondent is an indication that the duties of such a watchman were necessary.

The respondent, Southern Package Corporation attached great significance to the fact that in the agreed statement of facts in this case it is stated that Fred Walton was not engaged in the manual and physical process of making or manufacturing the goods for interstate commerce. The duties of the watchmen in this case and in the cases of *Kirschbaum Company v. Walling*, *supra*, were the same: guarding and protecting the plants and reporting fires and trespassers. The United States Supreme Court in the case of *Kirschbaum Company v. Walling*, *supra*, held that other duties were unnecessary in order to entitle the employee to the benefits of the Act and that the statute

could not be construed as meaning that the employee must be engaged in the physical process of making the goods in order to be covered by the Act since the Act itself has specifically provided otherwise.

The Supreme Court of Mississippi commented at length upon this decision of the United States Supreme Court (Record, pages 14-16), and in this discussion it apparently views the entire Fair Labor Standards Act with disapproval. (Record, pages 13-16) It says: "the constitutionality of the Act was upheld in the case of *United States v. Darby*, 312 U. S. 100, * * * and the wanton waste of 'plowing under' needed hours of labor during a period of manpower shortage in a great world crisis has until recently remained unhindered." It will be noted that this suit was brought long before our nation declared war, so apparently this statement of the Mississippi Supreme Court is not made because it feels that the provisions of the Act should be relaxed in an emergency but because it believes the Act should have never been enacted. The comments of the Mississippi Supreme Court upon the case of *Kirschbaum Company v. Walling*, *supra*, show that the state Supreme Court regards the Fair Labor Standards Act of 1938 with disfavor. (Record 14-16).

Although it devoted a great deal of space to a discussion of the decision of the United States Supreme Court, the Mississippi State Supreme Court neglected to point out the distinction between these cases decided by the United States Supreme Court and the instant case. Chief Justice Smith of the Mississippi Supreme Court realized that this decision of the United States Supreme Court was directly in point in a consideration of this case and dissented, "being of the opinion that Fred Walton's employment by the appellant was within and covered by the provisions of the Fair Labor Standards Act of 1938. *Kirschbaum Co. v. Walling*, 316 U. S. 517, 86 L. Ed. 1638." (Record, page 17.)

The Mississippi Supreme Court in its majority opinion apparently interpreted the Act differently from the United States Supreme Court and instead followed a decision of the North Carolina Supreme Court, *Hart v. Gregory*, 218 N. C. 184, 10 S. E. (2d) 644, 130 A. L. R. 265 (Record, page 8). This decision of the North Carolina Supreme Court was rendered in October, 1941, prior to the decision of *Kirschbaum Company v. Walling*, *supra*, and allowed a watchman a recovery due to the fact that he also kept the boilers filled up at night. The North Carolina Court implied that a watchman ordinarily would not be covered by the Act. It is hard to reconcile this decision with logic as it would be difficult to distinguish the duty of filling boilers from the other duties of a watchman. It would appear that a watchman who prevented fires or trespassers from destroying the boiler would be performing as valuable a task to production as one who kept the boiler from burning dry by filling it. However, the Supreme Court of North Carolina seems to be the only court that has ever attached any great significance to this distinction, and its decision was with a divided court. Justice Seawell dissenting. Furthermore, at the time of this decision the North Carolina court did not have the benefit of a decision of the United States Supreme Court directly in point to guide it in the construction of this Act.

The Supreme Court of Mississippi appeared to accept the theory that the watchman must be engaged in "other manual activities" (Record, page 10) in order to be entitled to the benefits of the Act. It is difficult to see where such a requirement is made in the Act or implied by its terms. Could it logically be said that a watchman who guards and protects his employers plant and reports fires and trespassers is not covered by the Fair Labor Standards Act, but if he occasionally answers the telephone after business hours, he is entitled to all its benefits? (Opinion of Mississippi Supreme Court, Record, page 10). The United

States Supreme Court in the case of *Kirschbaum v. Walling*, supra, did not draw such a distinction but decided that the watchmen were entitled to the benefits of the Act because as watchmen guarding and protecting the buildings, they were performing services necessary to interstate commerce. The Mississippi Supreme Court also attempts to distinguish the instant case from cases where the watchman is employed only "to guard the goods while awaiting shipment" and indicates that in the latter cases the watchman is entitled to the benefits of the Act (Record, page 16). It would appear that a watchman who guarded and protected the plant where the goods were manufactured for interstate commerce and where the products would necessarily be kept while awaiting shipment would be even more closely connected with the production of goods for interstate commerce than one who merely watched the products. In the *Kirschbaum* case, the watchman were employees of the owner of the building, and coverage in this decision was based on the theory that "maintenance of a safe, habitable building is indispensable to" the production of goods for interstate commerce. 316 U. S., at 524. The logic of this decision is obvious from the phraseology of the Act.

It further appears that there are great numbers of decisions which are based on the same reasoning employed in the decision of *Kirschbaum Company v. Walling*, supra, and the great weight of lower court decisions are in accord. *Fleming v. A. B. Kirschbaum Company* (D. C. E. D. Pa.) (1941), 4 Wage & Hour Rep., page 171; *Joe Lohr v. S. H. Robinson & Company, Inc.*, 156 S. E. (2d) 432, affirming 156 S. W. (2d) 359; *Lefever v. General Export Iron and Metal Company*, D. C. S. D. Texas (Corpus Christi Div.) (1940), 38 F. Supp. 838; *Hargrave v. Mid-Continent Petroleum Corporation* (E. D. Okla.), 42 Fed. Supp. 908 (1941); *W. L. Campbell v. Superior Decalcomania Company, Inc.* (D. C. N. D. Tex., Dallas Div.) (1940), 1 Wage & Hour Cases 347.

The respondent in the lower courts cited numerous cases which it claimed were authorities to the effect that a watchman is not entitled to the benefits of the Fair Labor Standards Act. However, in petitioner's opinion they are not in point in a consideration of this case for one or the other of two reasons: (1) They involved watchmen who were *employed by retail businesses*, or (2) they involved employees who were *not employed as watchmen* but were engaged in some other line of work less important and only remotely connected with production.

It does not appear that the Supreme Court of Mississippi ever pointed out a factual difference between the cases decided by the United States Supreme Court and the instant case. The State Supreme Court did comment on the fact that the plant where Walton worked did not operate regularly at night, which is usually the case with most manufacturing plants of that kind under ordinary circumstances. In its opinion (Record, page 9) the Supreme Court of Mississippi says: "Presumably the night watchman slept during the day-time; while the other employees were engaged in the production of goods for commerce. He contributed nothing to such work or production. * * *". In the same paragraph the Court says: "If the plant had been running at night, the services of a night watchman would not have been required at all, even to satisfy the request of the insurance company." The Mississippi Supreme Court seems to say that since certain manufacturing operations are discontinued at the plant during the night, a night watchman is not an employee necessary to production; and yet because of this very fact he is "required". The State Supreme Court refers to the fact that the goods were not regularly manufactured at night again in the conclusion of its opinion. It is petitioner's opinion that this fact is the very reason that a watchman was necessary for production since he protected the plant from damage or loss while other employees slept. In *Bowie v. Gonzales*, 117

F. (2d) 11, 20 (C. C. A. 1) employees engaged in repair and maintenance of sugar mills in the dead season were held covered. The respondent apparently accords significance to the fact that the employee in this case agreed to work for respondent for much less than the wage provided for by the Fair Labor Standards Act, and the Mississippi Supreme Court also commented on this fact. It will be noted that Fred Walton's employment was before the War when employment was much scarcer than at the present time. It is conceded that an employee in poor economic condition might be driven by dire necessity to accept employment for less than a decent living wage to prevent worse suffering in his family. However, the provisions of the Act itself (Section 3(g)) expressly prevent a defendant from setting up such an unreasonable defense.

Any contention that the benefits of the Act do not extend to an employee unless he is engaged in the "actual production" of goods, unless he is manually and physically making the product would only show a desperate attempt to escape liability by taking refuge in flimsy technicalities of no reasonable significance. As was stated by this Court in the case of *Kirschbaum Company v. Walling, supra*, the final clause of Section 3(j) of the Fair Labor Standards Act "can not thus be read out of the Act;" nor can it be said by respondent that Walton's duties were not necessary to the production of goods for interstate commerce since it is admitted that he watched over respondent's manufacturing plant, made regular rounds, and protected it from loss or destruction by fires or thieves.

From a direct reference to the Fair Labor Standards Act of 1938, Section 3(j), the logic of the decision of the United States Supreme Court is apparent. The final clause of Section 3(j) states that an employee engaged "in any process or occupation necessary to the production" of goods for interstate commerce is entitled to the benefits

of the Act. Certainly it would seem that a watchman who protects a timber manufacturing plant from destruction by fires and trespassers is necessary to production and like the watchman in the case of *Kirschbaum Company v. Walling*, *supra*, who had identical duties, his employment is covered by the Fair Labor Standards Act of 1938. It is, therefore, respectfully submitted that the decision of the Supreme Court of Mississippi in the instant case is not in accord with the decisions of this Honorable Court and a logical interpretation of the Act itself.

POINT (B).

From reference to similar cases regarding the survival of actions it appears that an action for back wages for overtime work, liquidated damages, and reasonable attorney's fees as provided by the Fair Labor Standards Act of 1938 would survive the death of the employee for the benefit of his estate.

As the plaintiff's estate was diminished and the defendant unlawfully enriched by its illegally holding amounts due the deceased plaintiff, it would appear that there is some analogy between this case and actions under the Sherman Anti-Trust Act, 15 U. S. C. A., Sec. 15, wherein Federal Courts have held that the cause of action would survive. *Momand v. Twentieth-Century Fox Film Corporation*, W. D. Okla., 37 F. Supp. 649 (1941).

There is an interesting discussion of the survival of the action under Section 16(b) contained in XIV Mississippi Law Journal, pages 157 *et seq.*, under the caption "Private Litigation Under the Wage and Hour Act", by Rufus G. Poole, Assistant Solicitor, in charge of opinions and reviews, United States Department of Labor. This article summarized the cases regarding survival and pointed out that since actions under the Anti-Trust Law are held to survive, an action under Section 16(b) of the Fair Labor

Standards Act would logically survive on the same principle. The discussion refers to the following cases:

“In *Sullivan v. Associated Bill Posters*, (6 F. (2d) 100), an action for triple damages under the Anti-Trust Act was held to survive against the estate of the deceased wrongdoers; and in *Moore v. Backus* (78 F. (2d) 571) (C. C. A. 7th 1935), cert. denied, 296 U. S. 640, 56 Sup. Ct. 173, 80 L. Ed. 456 (1936)) a similar action was held to survive in favor of the estate of the deceased plaintiff. The rule is apparently the same where the ‘deceased party’ is a dissolved corporation. (*Imperial Film Exchange v. General Film Co.*, 244 Fed. 985, 986 (S. D. N. Y. 1915)). These cases proceed upon the theory that the action for triple damages is an action for injury to the plaintiff’s property as a result of an illegal conspiracy; and that while such an action sounds in tort, it survives and may be pursued against the estate of a deceased person because the property or the proceeds or value of the property belonging to the plaintiff have been appropriated by the deceased person and added to his own estate or money. (*Imperial Film Exchange v. General Film Co.*, 244 Fed. 985, 986 (S. D. N. Y. 1915) (As to the claim of an employee for back wages alleged to be due him by his bankrupt employer, see *In re New Style Hat Mfg. Co.*, 4 Wage Hour Rep. 29 (N. D. Ohio 1940)) (*United States v. Daniel*, 6 How. 11, 12 L. Ed. 323 (U. S. 1848); *Ratton v. Brady*, 184 U. S. 608, 22 Sup. Ct. 493, 46 L. Ed. 713 (1901); *Sullivan v. Associated Bill Posters*, 6 F. (2d) 1000 (C. C. A. 2d, 1925); *Moore v. Backus*, 78 F. (2d) 571 (C. C. A. 7th, 1935) cert. denied, 296 U. S. 640, 56 Sup. Ct. 173, 80 L. Ed. 455 (1936). This exception, as originally stated in the Statute of Edward III, covered only the death of the injured party. However, judicial decisions have extended its application to cases where the defendant wrongdoer is the deceased; provided,

always, that the wrongful act resulted in both a decrease in the estate of the injured party and an increase in that of the wrongdoer.”

From the cases cited above it appears that the Act survives or not according to the principles of common law of which the Statute of Edward III is regarded as a part. The statute 4 Edw. III, c. 7, permitted executors to maintain action of trespass for chattels taken and carried away in the life time of the testator, but did not cover cases involving the death of the defendant. If the injury giving rise to the right affected the property of the decedent, the tort action will survive, *Moore v. Backus, supra*, and judicial decisions have extended the application of the Statute of Edward III to cases where the defendant wrongdoer is the deceased, so long as the wrongful act resulted in a decrease in the estate of the injured party and an increase in that of the wrongdoer. *Sullivan v. Associated Bill Posters, supra*. Since there is absolutely no reason in logic or justice why a defendant should be allowed to escape liability and enjoy the proceeds of his wrongdoing while the estate of the injured decedent bore the loss, there is small wonder that as far back as the enactment of 4 Edw. III, c. 7, it was found necessary to prevent such injustice by the enactment of this statute which has been incorporated into the common law.

While actions under Section 16(b) of the Fair Labor Standards Act are remedial and not penal, *Overnight Motor Transportation Company v. Missel, Md.*, 62 Sup. Ct. 1216 (1942), it is interesting to note that the Mississippi Supreme Court held that an administrator could sue and recover punitive damages against a wrongdoer:

“Punitive damages are inflicted for the purpose of deterring a culprit in the future, and the imposition of them for such purpose is impossible in the case of a person

deceased. But where the trespasser is still alive, as in the case at bar, there is no reason whatever why he should be exonerated because of the death of the one on whom he has committed a trespass; for the punishment is imposed not to deter him from repeating his trespass as against the particular party assailed or injured, but to secure his general good behavior." *Wagner v. Gibbs*, 80 Miss. 53, 31 So. 434, 92 Am. St. Rep. 598. The reasonableness of this decision is obvious.

The Anti-Trust Act makes no specific provision for survival of actions, but the authorities under which this act has been held to survive are numerous and their reasonableness is apparent. Under the rule set out in the cases decided under the Anti-Trust Act cited above, it appears that a defendant can not dodge liability imposed by a law simply because the injured party died. It would certainly seem that if the Anti-Trust Act, 26 Stat. 209 (1890, 50 Stat. 693 (1937), 15 U. S. C. A., Sec. 1, et seq. (1941) providing for triple damages for injury to the plaintiff's property, as a result of an illegal conspiracy, is held to survive, then this action under Section 16(b) of the Fair Labor Standards Act of 1938 for back wages for overtime work and for liquidated damages would also survive on the same theory. It appears from the agreed statement of facts (Record, page 3) that Walton was paid nothing for a considerable amount of overtime work. By appropriating Walton's \$400.00 and the amount of his liquidated damages the respondent is still profiting by the loss sustained by Walton and his estate. In the instant case the amount due the employee's estate for uncompensated services and the loss to his estate is more easily determinable and the injury to the property of the deceased employee is more obvious than in the suits under the Anti-Trust Act. That the respondent's estate is illegally enriched by the amount now due the deceased employee's estate, which accrued to the employee prior to

his death, is also apparent. It is believed by petitioner that this cause of action should survive under the same theory that actions under the Sherman Anti-Trust Act have been held to survive.

In regard to whether an action under Section 16(b) of the Fair Standards Act of 1938 will survive for the benefit of the employee's legal representative, two cases are of interest: *Momand v. Twentieth-Century Fox Film Corporation et al.* and *Same v. Griffith Amusement Co.* (W. D. Okla.) 37 F. Supp. 649 (1941); and *La Guardia v. Austin-Bliss General Tire Co., Inc.* (S. D. N. Y.) 44 F. Supp. 678 (1941).

Momand v. Twentieth-Century Fox Film Corporation, supra, was a suit under Section 7 of the Sherman Anti-Trust Act, 15 U. S. C. A., Sec. 15. The defendants contended that the alleged cause of action sounded in tort and that plaintiff could not maintain the suits as an assignee because Oklahoma law forbids the assignment of a cause of action for a tort. The court held that this action to recover treble damages for violation of the anti-trust laws by a combination and agreement injuring plaintiff's assignors in their business and property was not barred by this Oklahoma statute forbidding the assignment of causes of action for torts. The court in this case also said: "The right of action created by Section 7 of the Sherman Anti-Trust Act, is not a penalty but remedial, and the remedy granted is to one injured in his business or property by reason of the acts forbidden in the preceding sections of the Act." The court in this case also states that this cause of action under the Sherman Anti-Trust Act would survive for the benefit of the legal representative of the injured person. It says: "Assignability and survivability are convertible terms and, for the purpose of considering the applicable law, cases involving survivorship are applicable." It would, therefore, appear that if a cause of action was

assignable, it would likewise survive and could be maintained by an executor or administrator. *La Guardia v. Austin-Bliss General Tire Co., Inc.*, 41 F. Supp. 678, *supra*, specifically held that an assignee of employees' claims under the Fair Labor Standards Act for unpaid overtime compensation may maintain action therefor. Since assignability and survivability are determined by similar factors, *Momand v. Twentieth-Century Fox Film Corporation*, *supra*, it would seem logical to conclude that the action under the Fair Labor Standards Act would also survive for the benefit of the deceased employee's estate.

POINT (C).

It appears from numerous judicial authorities that Section 2301, Mississippi Code of 1930, the state one-year statute of limitations for actions for penalties and forfeitures, does not apply to Section 16(b) of the Fair Labor Standards Act of 1938, providing an action for overtime compensation, liquidated damages, and a reasonable attorney's fee.

The Mississippi Supreme Court in its decision of the instant case (Record, pages 13-14) states that the liquidated damages provided for in section 16(b) of the Fair Labor Standards Act is a penalty. It would seem that this opinion is also not in accord with decisions of this Court, since the Supreme Court of the United States held that an action under this provision of the Fair Labor Standards Act of 1938 is not a suit for a penalty and that the additional equal amount is liquidated damages in the recent decision of *Overnight Motor Transportation Company vs. Missel*, 62 Sup. Ct. 1216 (1942).

In this case respondent, Missel, was an employee of the petitioner, Overnight Motor Transportation Company, a corporation engaged in interstate motor transportation as a common-carrier. He acted as a rate clerk for this corporation. Respondent brought a statutory action to

recover unpaid overtime compensation, an additional equal amount as liquidated damages, and counsel's fee under the Fair Labor Standards Act of 1938. In holding that the act was demedial, Mr. Justice Reed, who delivered the opinion of the court said:

"The liquidated damages for failure to pay minimum wages under Section 6(a) and 7(a) are compensation, not a penalty or punishment by the Government. Cf. Huntington v. Atrill, 146 U. S. 657, 667, 668, 674, 681, 13 S. Ct. 224, 227, 228, 230, 233, 36 L. Ed. 1123; Cox v. Lykes Brothers, 231 N. Y. 376, 143 N. E. 226. The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages." (Italics supplied). In the footnote to this decision a great number of authorities are cited in support of this opinion of the United States Supreme Court.

In the case of *La Guardia v. Austin-Bliss General Tire Co.* (S. D. N. Y.) 41 F. Supp. 678 (1941), the Court said: "The recovery of liquidated damages is not by way of penalty but is additional compensation to the employees for being illegally deprived of their overtime. *Robertson v. Argus Hosiery Mills, supra*, (121 Fed. (2d) 285); *Townsend v. Boston & M. R. R., supra*, (35 F. Supp. 938); *Berget v. Thouser, supra* (36 F. Supp. 168); *Hargrave v. Mid-Continent Petroleum Corp., D. C.* 36 F. Supp. 233."

The recent case of *Abram et al. v. San Joaquin Cotton Oil Co.* 46 F. Supp. 969 (1942) is a case discussing what statute of limitations is applicable to Section 16(b) of the Fair Labor Standards Act. The court held that the liquidated damages recoverable from the employer under the Fair Labor Standards Act by an employee entitled to recover overtime compensation do not amount to a "penalty" within the California one-year statute of limitations:

A provision is more readily construed as being for liquidated damages and not as being a penalty when it would be difficult to measure or ascertain actual damages. *F. S.*

v. Bethlehem Steel Co., 205 U. S. 105, 27 S. Ct. 450, 51 L. Ed. 731; *Cleveland Crane etc., Co. v. American Cast Iron Pipe Co.*, 168 Ala. 250, 53 So. 313; *Bright v. Rowland*, 4 Miss. 398; 17 C. J. 941. In the enactment of the Fair Labor Standards Act, the United States Legislature realized that it would be impossible to assess the exact extent of a working man's injury by not receiving his wages at the time when he was first entitled to them and for working overtime without adequate compensation at the time for this extra work and effort; therefore, it was provided for the employee to have an amount equal to his recovery for back wages as liquidated damages. This was a reasonable provision since the more back wages a plaintiff is entitled to the more he has been damaged by not receiving his pay at the proper time. In the case of *Shelton Electric Company v. Victor Talking Machine Company*, 277 Fed. 433, 435, the Court said in discussing a problem somewhat similar to the one in the instant case: "The treble damages, which the complainant seeks to recover, are neither a penalty or a forfeiture, but merely treble damages allowed by law for the redress of a private injury."

The Federal jurisdictional statute, 28 U. S. C. A. Sec. 371, makes the provision that suits for penalties under federal statutes should be brought in federal courts. If the United States legislature had regarded this Act as penal in its nature, it would not have dedicated to the state courts the power to enforce it. If this suit were a suit for a penalty, suit would be brought in a federal court and the federal five-year statute of limitations would apply. 28 U. S. C. A. 791. The remedial nature of the act is emphasized in the "Finding and Declaration of Policy" contained in the Act itself. Secs. 2(a) and (b).

It is therefore, respectfully urged, that the decision of the Mississippi Supreme Court in this case was not in accord with applicable decisions of this Court since the State

Supreme Court apparently arrived at the conclusion that the liquidated damages provided by the Fair Labor Standards Act were penalties. It appears that the United States Supreme Court in the case of *Overnight Motor Transportation Company vs. Missel*, 62 S. Ct. 1216, supra and great numbers of lower court decisions have held that Section 16(b) of the Fair Labor Standards Act is not penal but is a remedial provision for compensation, and it seems clear that this is the interpretation of the Act the lawmakers intended. It is petitioner's belief that this point should have been decided in accordance with the authorities cited above and that the Supreme Court of Mississippi should have held that this action is under a remedial statute, and that, therefore, the Mississippi one-year statute of limitations for actions for "penalties and forfeitures", Section 2301, Mississippi Code of 1930, has no application to this suit and petitioner's action is not barred thereby. It would appear from the authorities cited above that petitioner is entitled to recover \$400.00 as back wages for overtime work, \$400.00 as liquidated damages, and a reasonable attorney's fee.

It is, therefore, respectfully submitted that judgment of the Mississippi Supreme Court should be reviewed by this Honorable Court and finally reversed.

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